**United Nations** **AT**

**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 951

Case No. 1043: AL-KHATIB

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Julio Barboza, Vice-President; Mr. Kevin Haugh;

Whereas, on 7 May 1998, Samir Abdullah Ahmed Al-Khatib, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 6 September 1998, the Applicant, after making the necessary corrections, again filed an application containing pleas which read as follows:

"**II. Pleas**

To be returned into my post since the Field Administration Office - Jordan terminated me from my job on the basis that a woman claimed that I have made sexual relation with her (raped her) at the Area Office on Tuesday 8-10-1996 at 15.30 hrs."

Whereas the Respondent filed his answer on 31 March 1999;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on a temporary indefinite appointment on 2 January 1991 as an Area staff member in the capacity of Sanitation Labourer, grade 1, at Baqa'a Camp, Jordan. Effective 1 January 1993, he was transferred to the post of Doorkeeper/Cleaner at the North Amman Area Office, Jordan.

On 17 October 1996, the Area Officer, North Amman, Jordan, notified the Field Personnel Officer and Deputy Field Administration Officer (D/FAO), Jordan, that the Applicant had been arrested by the police at the North Amman Area Office the previous day. He stated that a policeman accompanied by a lady had come to the Area Office, and that the lady had claimed that the Applicant had "made sex with her" at the Area Office on 8 October 1996. The Applicant was suspended without pay on the same date.

In a memorandum dated 29 October 1996, the Area Officer, North Amman, informed the Field Personnel Officer and D/FAO, that the Applicant had come to his office that day and provided certain documents concerning his release. He inquired whether the Applicant should be allowed to resume duty.

On 23 January 1997, the Area Officer, North Amman, informed the Field Personnel Officer and D/FAO that the court verdict in the Applicant's case had still not been announced even though the Applicant, who was already released on bail, had attended several court sessions on the case.

On 4 March 1997, the Applicant wrote to the Director of UNRWA Operations, Jordan, requesting approval to return to work.

By letter dated 31 March 1997, the Field Administration Officer (FAO), Jordan, informed the Applicant that his return to work could not be considered until he had provided either a final court judgement or a copy of the charge sheet issued against him. The Applicant was requested to provide such documentation no later than 20 April 1997, otherwise the Agency might be "obliged to consider the termination of his services".

On 5 April 1997, the Great Criminal Court issued a "decision" that it had found the Applicant innocent of the accusations against him, but stated that "this verdict [was not] the final court judgement". On 7 April 1997, the Area Officer, North Amman, sent a copy of the judgement to the FAO. On 11 May 1997, the Area Officer wrote a memorandum to the Officer-in-Charge, Department of Administration, Jordan, resubmitting another copy of the court judgement which was now marked "TRUE COPY, THE JUDGEMENT BECAME FINAL".

According to a Note for the record dated 11 June 1997, the FAO and the D/FAO met with the Applicant "in order to find out whether a quick decision about his reinstatement could be taken". During the meeting, the Applicant was questioned in detail about the circumstances of the case, but the FAO and the D/FAO found his answers inconsistent:

- He continued to be held in custody although the accusing woman had said at the police station that it was not the Applicant who had attacked her, but someone else by the same name;

- The Applicant's family had entered into an agreement with the woman's family, called an "Atwa" under Jordanian tribal traditional law. The Applicant could not give convincing reasons why his family would have entered into such an agreement, which implies that the person is guilty. Especially in a case of rape, it is unlikely they would have done this simply to keep the peace between the families or if the Applicant were innocent;

- According to the Applicant, the woman demanded money to give up her rights and withdraw the case, and she was paid a considerable amount. When the Applicant was asked why his family paid so much money, this being an acknowledgement of guilt, he stated that his family was not aware of this.

On the same date, the Acting Director of UNRWA Operations, Jordan, wrote a letter to the Senior Administration Officer, Headquarters, Gaza, and informed him of his intention terminate the Applicant's services in the interest of the Agency. The Acting Director felt that it was "impossible also for cultural reasons, to reinstate [the Applicant] at the same Area Office post because the staff there, in particular the female ones, would neither understand nor accept his return to his previous work place. In addition, there [was] credible information that [the Applicant did] not observe due restraint vis-à-vis female visitors to the Area Office and there [was] no reason to expect he [would] do otherwise in another area".

On 3 July 1997, the Officer-in-Charge, UNRWA Operations, Jordan, wrote to the Applicant and informed him of the decision to terminate his services in the interest of the Agency under Area staff regulation 9.1 and staff rule 109.1, effective that date. He said the charge of rape and the circumstances of payments to the complainant had harmed the Agency's image and cast strong doubts on the Applicant's personal conduct and reliability. He added that the Agency had lost confidence in the Applicant and could not trust him to work for it with "this moral miasma surrounding" him.

In an undated letter to the Director of UNRWA Operations, which was received on 16 July 1997, the Applicant requested a review of the decision to terminate his appointment. In his reply of 28 July 1997, the Director of UNRWA Operations stated that the Agency had lost trust in the Applicant and that the decision to terminate him stood.

On 5 August 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

In an undated letter, which was acknowledged by the JAB on 4 November 1997, the Applicant petitioned the Director of Administration and Human Resources Management to reinstate him. He attached a document issued by local "Moktars". The document explained that an "Atwa" in that locality, constitutes an agreement between "tribes" to cease a conflict for a period of time until an issue has been investigated. It further explained that where an accused is found innocent, the money paid in connection with the Atwa is refunded by the complainant.

The JAB submitted its report on 1 March 1998. Its evaluation, judgement and recommendation read, in part, as follows:

"**III. EVALUATION AND JUDGEMNT**

18. ...

c) By reference to the court judgement, the Board noted that paragraph 6/3 stated '*... that the complainant had already done this before ...*', also paragraph 6/4 states that '*it was evident from the statement of the mother of the complainant that her daughter sometimes imagines things which are untrue.* She added that *her daughter had already lodged a complaint against someone, but the court discharged him*", furthermore paragraph 6/V states that '*when the complainant saw the accused, Sameer, she said that [it] wasn't him.*' Also

paragraph 6/VI states that '*as seen from these contradictions, the court is not of peaceful mind and does not trust the statement of the complainant and found it unreliable ...* ' Accordingly the court decided to declare the accused as innocent and discharged him.

d) The Board also noted that since the Appellant was declared innocent then there is no evidence that he harmed the Agency's image, but on the contrary his own image and reputation were harmed for no strong reason.

e) The Board is of the opinion that the Administration did not take the final decision of the court into consideration, ..., by reference to [the letter dated 31 March 1997 from the FAO to the Applicant] which states '*your return to work cannot be considered before providing us with a final court judgement or, at least a copy of the charge sheet issued against you'*.

## IV. RECOMMENDATION

19. In view of the foregoing ..., the Board unanimously makes its recommendation that the Administration's decision appealed against be reviewed with a view to reinstating the Appellant and that his absence as from 3 July 1997 be dealt with in accordance with standing UNRWA Rules and Regulations".

On 22 April 1998, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

While I note that the criminal proceeding against you did not result in a conviction, I also note that the standard of proof in a criminal case is higher than that which bound the Administration in its consideration of whether your continued employment was in the best interest of the Agency. Moreover, I cannot accept the Board's finding that the whole affair has not harmed the Agency's good image in Jordan. I am also concerned that the Board appears to have overlooked the fact that the Administration did consider the acquittal in reaching its decision and ignored the fact that your family paid money to the family of the complainant and the implications thereof in Jordanian tribal traditional law.

In these circumstances, I am unable to accept the recommendation of the Joint Appeals Board. Your appeal is hereby dismissed."

On 6 September 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to terminate his appointment was without legal justification since he had been declared innocent of the accusations against him.

2. The payment to his accuser by his relatives was made without his permission. According to the local customs of the region such a payment was made merely as reconciliation pending a court judgement.

Whereas the Respondent's principal contentions are:

1. The Applicant has not provided convincing evidence that the decision was procedurally flawed or improperly motivated.

2. The termination of the Applicant's appointment was justified. The verdict of the court is not conclusive as to whether the Applicant had engaged in inappropriate behaviour on UNRWA premises. His contradictory statements concerning payment of money under tribal custom raised considerable doubt as to the actual purpose of the payment. His return to work might have an adverse affect on the Agency's operations.

3. If the Applicant did not expressly authorize the payment to the complainant, he knowingly allowed the payment to be made to secure an honourable resolution of the matter which together with the making of contradictory statements caused the Agency to lose confidence in him as a staff member.

The Tribunal, having deliberated from 5 to 28 July 2000, now pronounces the following judgement:

I. Whilst the Respondent enjoys a wide discretion as to what constitutes "the interest of the Agency" it is not a discretion that is unfettered. It is a discretion which must be exercised rationally.

If a decision to terminate the appointment of a staff member under the provisions of staff regulation 9.1 is made capriciously or arbitrarily, that decision will be neither lawful nor valid. Furthermore, the reasons for such a decision should be apparent so that they may be reviewed by a JAB or another body or by the Tribunal. Otherwise the staff member concerned would be unable to exercise fruitfully his or her rights.

The term "in the interest of the Agency" should not be construed narrowly so as to embrace only the concept of the convenience of the Agency for there are other competing interests at stake. It is in the interest of the Agency to be seen to act fairly. It would not be in the interest of the Agency to make decisions that are patently unjust or irrational and to act thereon.

II. On 16 October 1996, the Applicant was arrested and detained by the police on a charge of rape. He was released on bail on 28 October 1996. By virtue of that charge he was suspended from duty without pay. On 4 March 1997, he requested to be allowed to return to work. At that time a trial was apparently still pending. In reply to this request he was informed that his return to work could not be considered until he had provided the Administration either with a final court judgement or with a copy of the charge sheet issued against him at least. He was urged to provide the Administration with the required document not later than 20 April 1997, "otherwise the Agency may be obliged to consider the termination of your services". On 7 April 1997, the Respondent was notified that the Great Criminal Court, Jordan, declared the Applicant innocent of the accusation made against him. However, the verdict indicated that it was not the final court judgement.

On 11 May 1997, the Administration was furnished with another copy of the Great Criminal Court, Jordan, indicating it had become final.

On 8 June 1997, the FAO met with the Applicant, who was still seeking reinstatement and who was still on suspension. The Applicant was questioned about the circumstances of the case. It is clear that the FAO was unwilling to accept the acquittal of the Applicant by the Great Criminal Court at face value, because (a) he could not understand why the police had continued to hold the Applicant in custody after a time, when according to the Applicant, the accusing woman had admitted that he was not the person who had raped her, and (b) a payment called "an Atwa" had been paid by the

Applicant's family to the accusing woman's family. He took this payment to imply the Applicant's guilt. The FAO indicated that "as we are talking about a case of rape, it is difficult to see that the family of the [Applicant] would have done this, simply to keep peace between the families. It is a serious crime that touches upon the honour of the [Applicant's] family. It is difficult to believe that the family of the staff member would have gone through this procedure if the [Applicant] is innocent".

The Applicant had stated in relation to the payment of the said Atwa that neither he nor his relatives were aware that the payment would be construed as an admission or an acknowledgement of his guilt or of the possible consequences arising from this payment. The FAO recorded that he did not find this explanation to be plausible or believable.

On 11 June 1997, the Acting Director of UNRWA Operations, Jordan, recommended that the Applicant's services should be terminated in the interest of the Agency. It is clear that he likewise was unwilling to accept the acquittal by the Great Criminal Court at face value. He felt it impossible to reconcile the payment of the Atwa by the Applicant's family with the Applicant's innocence, considering such a payment tantamount to an admission of guilt on the part of the Applicant. Alternatively, he considered it tantamount to subordination of perjury. He expressed the view that it would be impossible also for cultural reasons to "reinstate the [Applicant] at the same Area Office ... because the staff there, and particularly the female ones, would neither understand nor accept his return to his previous work place." He concluded: "In addition, there is credible information that the [Applicant] does not observe due restraint vis-à-vis female visitors to the Area Office and there is no reason to expect he could do otherwise in another area." He accordingly expressed his intent to terminate the staff member in the interest of the Agency. The Tribunal notes that there is no evidence available in the papers which would suggest that the allegation that the Applicant "had not observed due restraint vis-à-vis female visitors to the Area Office" had ever been put to the Applicant nor had he been afforded any opportunity of dealing with or answering that allegation.

By letter dated 3 July 1997, the Officer-in-Charge, UNRWA Operations, Jordan, informed the Applicant that "[a]lthough the court subsequently declared you innocent of rape, this case and the

accompanying circumstances of payments made on your behalf to the female in question and her family as admitted by you has harmed the Agency's image and cast strong doubts on your personal conduct and reliability. As such, the Agency has lost confidence in you and can no longer trust you to work in its installations with this moral miasma surrounding you." His services were accordingly terminated "in the interest of the Agency" under staff regulation 9.1 and staff rule 109.1 with effect from that date.

III. The Tribunal has ruled on previous occasions that, when an allegation or suspicion of misconduct so concerns the Administration that it contemplates dispensing with the services of the Applicant, it is appropriate to invoke and to follow the Regulations and Rules pertaining to allegations of misconduct. A failure to do so and the invocation of an inappropriate procedure instead, is likely to be found to constitute an abuse of power or an abuse of procedure. (Cf. Judgement No. 877, *Abdulhadi* (1998)). That is also the meaning of the decisions in Judgements No. 926, *Al Ansari* (1999) and No. 929, *Zarra and Khalil* (1999).

IV. It is very clear to the Tribunal that the genesis of the Administration's decision to terminate the Applicant's services in the "interest of the Agency" was the allegation of rape which had been made against him. It goes without saying that such an allegation would clearly and undeniably constitute an allegation of gross misconduct which would, if established, justify summary dismissal. The Tribunal is satisfied that the Respondent was not bound by the acquittal of the Applicant on the rape charge, since presumably different onuses and burdens of proof would arise in the Jordanian domestic criminal proceedings than would arise under an investigation for misconduct under the Administration's appropriate Regulations and Rules. The Tribunal is equally satisfied that the Respondent was entitled, without proper investigation or inquiry and without affording the Applicant a fair hearing, neither to reach his own and different verdict in relation to that charge nor to terminate his services in the"interest of the Agency". In the view of the Tribunal this is probably what was done here.

The Applicant appealed to the JAB against the Respondent's decision to terminate his services. The JAB unanimously made a recommendation that the Administration's decision appealed against be reviewed with a view to reinstating the Applicant and that his absence as from 3 July 1997 be dealt with in accordance with standing UNRWA Regulations and Rules.

The JAB analyzed the judgement of the Great Criminal Court which had declared the Applicant to be innocent of the charges. It appeared willing to take the acquittal at face value, noting that since the Applicant had been declared innocent, "then there is no evidence that he harmed the Agency's image, but on the contrary his own image and reputation were harmed for no strong reason". The Tribunal understands and accepts the validity of this analysis of the situation and the common sense of the JAB's conclusion. In the view of the Tribunal it is clearly illogical to find that a person has harmed the image or reputation of the Agency merely by the fact that he was charged with an offence of which he was found innocent.

VI. The record reflects very different points of view taken by the Applicant and the Respondent in relation to the significance of the payment of the Atwa. The Applicant has stated that firstly it was made by his family without his knowledge or approval. Secondly, it was in the nature of a provisional payment and in case of his acquittal, it would be returned by the accuser's family. Thirdly, it is recognized under Jordanian tribal custom and law as not carrying with it an implication of guilt. The Applicant further maintains that since he has been acquitted the Atwa has been repaid. It appears to the Tribunal that these points have never been satisfactorily analyzed or dealt with by the Respondent. Certainly the Tribunal can find nothing contained in the record to establish that the Respondent was entitled to reject those arguments and to dismiss them as being devoid of merit. The Tribunal notes that the Acting Director of UNRWA Operations, in a memorandum dated 11 June 1997, sets out the implications in Bedouin tribal law of payment from one family to another in a case such as this. The Tribunal does not know what relevance Bedouin tribal law has to the instant case or how it differs from the tribal law or custom of the Applicant's family or his accuser's family.

VII. The Respondent duly considered the report of the JAB. In his letter of 22 April 1998, he noted that the criminal proceedings against the Applicant did not result in his conviction but further noted that the standard of proof in a criminal case is higher than that which bound the Administration in its consideration of "whether your continued employment was in the best interest of the Agency". The Tribunal is somewhat troubled by this statement. It certainly appears to suggest that the acquittal of the Applicant on the rape charge did not in any way bind him when considering whether the Applicant's continuing employment was in the best interest of the Agency. This certainly suggests that he believed that he did not have to approach that consideration on the basis that the Applicant was not guilty. The Tribunal wonders whether, perhaps, the Respondent decided to consider his continuing employment on the basis that he was probably guilty but that this had not been proven?

The Respondent went on to say that he could not accept the JAB's findings that the whole affair had not harmed the Agency's good image in Jordan. This seems tantamount to saying that when an allegation has falsely been made against an innocent man and that false allegation has harmed the Agency's good image, it can nonetheless justify termination of the services of the innocent person. In the opinion of the Tribunal such a concept would be a defiance of legal principle, justice and common sense.

The Respondent then went on to express concern that the JAB appears "to have overlooked the fact that the Administration did consider the acquittal in reaching its decision and ignored the fact that your family paid money to the family of the complainant and the implications thereof in Jordanian tribal traditional law". In the view of the Tribunal this statement is nothing less than mischievous and disingenuous. If the Respondent by his decision to terminate the Applicant's services had accepted the Applicant's acquittal by the Great Criminal Court as a verdict of not guilty and if he had ignored the fact of the payment of the Atwa, as is implied by the Respondent, the Tribunal is then at a loss to know why the decision was made to terminate the Applicant's services in the interest of the Agency. It would seem that, if the acquittal was treated as such and if the payment of the Atwa was ignored, the services of the Applicant were terminated on the unsubstantiated allegation that he had not observed due restraint vis-à-vis female visitors to the Area Office, which had never been put to the Applicant or alternatively on the assumption that if he were to be reinstated

staff members would neither understand nor accept his return. The Tribunal is of the view that if the decision to terminate his services was made on either of those grounds or a combination of them it was clearly erroneous, unjust and could not be allowed to stand.

VIII. The Tribunal is satisfied that notwithstanding wording used, the true reason the Respondent terminated the Applicant's services "in the interest of the Agency" was because the Respondent did not accept the acquittal of the Great Criminal Court at face value and because it considered the Applicant guilty or someone who should be perceived as guilty notwithstanding his acquittal. If that was the situation, the Respondent should have followed the Regulations and Rules governing misconduct so that appropriate findings could have been made. The Tribunal is not satisfied that a loss of confidence in the Applicant is sufficient to justify the termination of his services "in the interest of the Agency" unless the facts giving rise to such a loss of confidence are identified. It seems clear to the Tribunal that the decision made here was made on the basis of unwarranted findings, and improperly drawn inferences. Under the circumstances the decision made should not be allowed to stand.

IX. For the foregoing reasons, the Tribunal:

1. Finds in favour of the Applicant and orders the rescission of the decision of the Respondent, dated 3 July 1997, to terminate the Applicant's appointment in the interest of the Agency;

2. Orders that the Applicant be reinstated in a position with the grade and the step that he held when he was separated, with full payment of salary and emoluments from the date of his separation from service;

3. Should the Respondent, within 30 days of the notification of this judgement decide, in the interest of the Agency, that the Applicant shall be compensated without further

action being taken in his case, the Tribunal fixes the compensation to be paid to the Applicant at two years of his net base salary .

(Signatures)

Hubert THIERRY
President

Julio BARBOZA
Vice-President

Kevin HAUGH
Member

Geneva, 28 July 2000

Maritza STRUYVENBERG
Executive Secretary